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March 3, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

RE: PR Docket No. 94-105; Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

Dear Mr. Caton:

Enclosed for filing are an original and four copies of the "Reply Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of its Petition to Regulate California Cellular Service." Because these Reply Comments do not contain any confidential information, there is no redacted copy being supplied to the Commission.

If you have any questions, please contact either David A. Gross at (202) 293-4955 or me.

Sincerely,

Kathleen Q. Abernathy

Attachment

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	PR Docket No. 94-105

REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS ON THE CONFIDENTIAL DATA SUBMITTED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF ITS PETITION TO REGULATE CALIFORNIA CELLULAR SERVICE

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March 3, 1995

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SUMMARY

The public record in this proceeding demonstrates that the CPUC has not shown that "market conditions" for cellular service in California "fail to protect subscribers adequately" from unjust, unreasonable or discriminatory rates. The CPUC's confidential submission does not alter that conclusion. To the contrary, the confidential data demonstrate that California's market conditions and favorable demographics have created a competitive environment.

The only comments taking a contrary position were filed by resellers seeking to preserve their protected status under the CPUC's regulation. The resellers' comments, however, do not remedy the fundamental inadequacy of the CPUC's Petition. The resellers, constrained by the CPUC's faulty analysis and by data that do not support the CPUC's claims, provide no compelling support for the CPUC's case. The CPUC's Petition, therefore, must be denied.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Petition of the People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates	PR Docket No. 94-105

REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS ON THE CONFIDENTIAL DATA SUBMITTED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF ITS PETITION TO REGULATE CELLULAR SERVICE RATES

Pursuant to Section 20.13 of the Commission's Rules and its Second Report and Order[1] and Second Confidentiality Order[2], AirTouch Communications ("AirTouch") hereby submits its reply to the comments submitted by various parties in the above-captioned proceeding on the confidential data submitted by the California Public Utilities Commission ("CPUC").[3]

1 In the Matter of Implementation of Section 3(a) and 332 of the Communications Act-Regulatory Treatment of Mobile Services, Second Report and Order, 9 FCC Rcd 1411 (1994).

2 Second Confidentiality Order, PR Docket Nos. 94-103, 94-105, 94-106, 94-108, DA 95-208, adopted February 9, 1995; released February 9, 1995.

3 AirTouch does not disclose any of the CPUC's confidential data in these reply comments.

I. INTRODUCTION.

The evidentiary record in this proceeding overwhelmingly demonstrates that the CPUC has not shown that "market conditions" for cellular service in California "fail to protect subscribers adequately" from unjust, unreasonable or discriminatory rates.[4] To the contrary, the record evidence, even as supplemented by the CPUC's confidential data, proves that California's market conditions and favorable demographics have created a competitive environment. The comments filed on the CPUC's confidential submission confirm that the data do not advance the CPUC's case. The data reflect phenomenal subscriber growth[5], technological innovation to meet that demand[6],

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4 See Section 332(c)(3) of the Communications Act of 1934, as amended.

5 "Comments of AirTouch Communications on the Confidential Data Submitted by the California Public Utilities Commission in Support of Its Petition to Rate Regulate California Cellular Service," dated February 24, 1995 (hereinafter, "AirTouch Comments re Confidential Data"), at 17-18; "Comments of Los Angeles Cellular Telephone Company Regarding Confidential Materials Submitted by the State of California," dated February 23, 1995 (hereinafter, "LACTC Comments re Confidential Data"), at 8; "Comments of McCaw Cellular Communications, Inc. on Unredacted California Petition," dated February 24, 1995 (hereinafter, "McCaw Comments re Confidential Data"), at 14; "Supplemental Comments of the Cellular Carriers Association of California Regarding the Unredacted Information Submitted by the Public Utilities Commission of the State of California," dated February 24, 1995 (hereinafter, "CCAC Comments re Confidential Data"), at 15-17.

6 AirTouch Comments re Confidential Data at 17-18; LACTC Comments re Confidential Data at 8-9; "Supplemental Comments and Opposition of GTE Service Corporation, on Behalf of Its Telephone and Personal Communications Companies, on Confidential Redacted Material Proffered in California's Petition for Ratemaking Authority," dated February 24, 1995 (hereinafter, "GTE Comments re Confidential Data"), at 9-10; CCAC Comments re Confidential Data at 15-18; McCaw Comments re Confidential Data at 14, 16.

declining prices and expanded consumer choice[7] and intensified competition spurred by the new wireless entrants.[8]

The only comments taking a contrary position were filed by resellers seeking to preserve their protected status under the CPUC's regulation. The resellers' comments do not remedy the fundamental inadequacy of the CPUC's evidentiary showing. In fact, these proponents of restrictive regulation simply adopt the CPUC's faulty conclusions, despite the fact that the confidential data do not support those conclusions. Both the CPUC and its limited supporters choose to ignore or misconstrue evidence of competition between the cellular carriers, and they similarly underestimate the level of competition in the new unrestricted wireless marketplace.

II. THE RESELLERS COMMENTS DO NOT BOLSTER THE CPUC'S INADEQUATE SHOWING.

As the Commission made clear, the CPUC bears the burden of proof in this proceeding to meet the Congressionally mandated standard that market conditions fail to protect subscribers from unjust, unreasonable or discriminatory rates. Despite the CPUC's unprecedented tactic of releasing highly sensitive competitive data, the CPUC still has not met its burden of

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7 AirTouch Comments re Confidential Data at 20-22; CCAC Comments re Confidential Data at 5-11; LACTC Comments re Confidential Data at 5, 10-15; GTE Comments re Confidential Data at 4, 10, Affidavit of Stanley Besen at 4-5.

8 AirTouch Comments re Confidential Data at 20-22; CCAC Comments re Confidential Data at 18-20; LACTC Comments re Confidential Data at 10-13; McCaw Comments re Confidential Data, Supplemental Affidavit of Bruce Owen at 3-4; GTE Comments re Confidential Data at 21.

proof. To the contrary, the confidential data provide evidence of effective competition between the cellular carriers which has been heightened by the entrance of new competitors such as Nextel. The resellers, constrained by the CPUC's faulty analysis and by data that do not support the CPUC's claims, provide no real support for the CPUC's case.

A. THE RESELLERS CONCEDE THAT PRICES HAVE DECLINED.

The record contains undisputed evidence of increasingly aggressive price competition through discount and promotional plans, resulting in significant savings to consumers.[9]

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9 See, e.g., "Opposition of AirTouch Communications to CPUC Petition to Rate Regulate California Cellular Service," dated September 19, 1994 (hereinafter, "AirTouch Opposition"), at 45-50, Appxs. E, H-K; "Opposition of Bay Area Cellular Telephone Company," dated September 19, 1994 (hereinafter, "BACTC Opposition"), at 4-5, 15-24, Appxs. A-D, H; "Opposition of U S WEST Cellular of California," dated September 19, 1994 (hereinafter, "U S WEST Opposition"), at 5; "Response of the Cellular Carriers Association of California Opposing the Petition of the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates," dated September 19, 1994 (hereinafter, "CCAC Response"), at 28-39, 64-69, 73, Tab A at 12-15, Table 5, Tab B at 2 (Charts D-J); "Response of Bakersfield Cellular Telephone Company to Petition by the California Public Utilities Commission to Retain State Regulatory Authority Over Intrastate Cellular Rates," dated September 19, 1994 (hereinafter, "Bakersfield Response"), at 9-10; "Comment of GTE Service Corporation in Opposition to the Petition of California Requesting Authority to Regulate Rates Associated with the Provision of Cellular Service Within the State of California," dated September 19, 1994 (hereinafter, "GTE Comment"), at 31-36, Attach. A at 6-7, Attach. B; "Response by Los Angeles Cellular Telephone Company to Petition by the Public Utilities Commission of the State of California to Retain State Regulatory Authority Over Intrastate Cellular Service Rates," dated September 19, 1994 (hereinafter, "LACTC Response"), at 10, 16-23, 30-31; and "Opposition of McCaw Cellular Communications, Inc.," dated September 19, 1994 (hereinafter, "McCaw Opposition"), at 38-40.

The resellers attempt to dismiss the significant savings available through these plans by citing the number of customers that remain on the basic plans in the San Francisco market.[10] This claim is simply an attempt to obscure the data which demonstrate the vast majority of the customers in the San Francisco market, as in all other major markets, subscribe to discount plans. Indeed, the resellers concede that "the percentage of subscribers using the basic rate plans has decreased" and "many, if not most, subscribers now utilize one of the many discount plans which all the carriers make available."[11] They similarly acknowledge that cellular service has experienced "incredible growth year after year"[12] in California, demonstrating customers' satisfaction with rates and service. The resellers cannot escape the data which demonstrate that California consumers have benefitted from innovative offerings providing significant savings and greater consumer choice.

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10 The resellers provide no quantification of the savings under these plans under the guise that it would be "misguided to become mired in the minutiae of comparing every facet of every carriers' rate plans." "Supplement to Comments on the Petition of the People of the State of California and the Public Utilities Commission of the State of California," dated February 24, 1995 (hereinafter, "Resellers Comments re Confidential Data"), at 2-3.

11 Resellers Comments re Confidential Data at 3.

12 Resellers Comments re Confidential Data at 2-3.

B. THE RESELLERS PRESENT AN INADEQUATE ANALYSIS OF EARNINGS AND CAPACITY UTILIZATION WHICH IS CONTRADICTED BY THE DATA.

The resellers rely heavily on the CPUC's calculation of rates of return to support their claim of allegedly excessive cellular earnings. However, accounting rates of return do not have significant probative value because they fail to provide an accurate measurement of economic depreciation rates, particularly relevant in an industry with rapid technological change.[13] Thus, the data upon which the resellers rely are, at best, immaterial and inconclusive.

The resellers analysis of data regarding revenues and expenses per subscriber is similarly flawed. The resellers concede that carrier revenues per subscriber are declining, but assert that cost declines are resulting in excess profits.[14] The resellers' claim is devoid of any supporting analysis and is contradicted by the CPUC's data regarding AirTouch which shows that costs have remained relatively constant, consistent with the nature of cellular investment.[15] Moreover, the resellers simply ignore the substantial declines in the price of cellular service which, on a percentage basis, have far exceeded AirTouch's decrease in operating expenses per subscriber.[16]

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13 AirTouch Opposition at 54-57, Appx. E at 15-18; BACTC Opposition at 25-26; CCAC Response at 39-45, Tab A at 21-22; GTE Comment at 20; LACTC Response at 24-27, 30-31; CCAC Comments re Confidential Data at 11-14.

14 Resellers Comments re Confidential data at 2, 3.

15 AirTouch Comments re Confidential Data at 6-8.

16 AirTouch Comments re Confidential Data at 6-9.

The evidence also demonstrates that the reduction in AirTouch's income is attributable to discount plans offering consumers significant savings.[17]

The resellers finally resort to the claim that carriers' earnings are remarkable because of the "gross underutilization of the carriers' capacity."[18] The resellers have simply adopted the CPUC's faulty analysis of capacity utilization which assesses capacity based on isolated cell cites and effectively ignores the fundamental attribute of cellular service, its mobility and thus unpredictable subscriber usage patterns.[19] The fact that certain cell sites are not at full capacity simply does not indicate that the system as a whole is underutilized.[20]

C. THE RESELLERS' ANALYSIS OF MARKET SHARE IS ERRONEOUS.

The resellers claim that their market share is declining and thus they are loosing "much of the limited competitive pressure which they currently offer."[21] The resellers assumptions regarding the relevance of market share data reflect several fundamental errors. As a threshold matter, the

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17 AirTouch Comments re Confidential Data at 6-9.

18 Resellers Comments re Confidential Data at 2.

19 AirTouch Opposition at 53-54, 57-59; BACTC Opposition at 29-35; CCAC Response at 46-51, Tab A at 27-31; LACTC Response at 32-39; GTE Comment at 21-26; McCaw Opposition, Exh. A at 33-36.

20 AirTouch Comments re Confidential Data at 14-18.

21 Resellers Comments re Confidential Data at 2.

resellers have never demonstrated any connection between an increased market share and lower cellular prices. To the contrary, the record evidence demonstrates that the CPUC enforced reseller margin has inflated prices for consumers.[22] The resellers also assume that cellular carriers do not compete. This Commission has found that cellular carriers compete[23] and the record in this proceeding supports that conclusion.[24]

Moreover, the resellers' market share analysis repeats the CPUC's fundamental error by relying solely on the historical duopoly market structure as the cause of allegedly inadequate competition.[25] Neither the resellers nor the CPUC can escape the fact that the historical duopoly market structure was well known to Congress when it determined that preemption of state regulation was warranted.

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22 AirTouch Opposition at 61-63; Bakersfield Response at 5; CCAC Response at 27-28; GTE Comment at 66-67; McCaw Opposition at 37.

23 See, e.g., In re Applications of Craig O. McCaw and AT&T, 9 FCC Rcd 5836 (1994) at ¶ 39. ("[T]he existence of two facilities-based carriers has created a degree of rivalry not present in the "wireline" exchange services under the former Bell system, and competition from other wireless systems, such as PCS, is on its way.")

Similarly, the Chairman of the Senate Commerce Committee has recognized that "the cellular industry is fiercely competitive." Letter of Senator Larry Pressler, Chairman of the United States Senate Committee on Commerce, Science and Transportation to Anne K. Bingaman, Assistant Attorney General, Department of Justice, dated February 2, 1995.

24 AirTouch Opposition at 45-46, 53-54, 68-69, Appx. E (Hausman) at 4-5 (Table 1), Appx. J; CPUC Petition at 45-46, Appx. K; UCAN/TURN Comments at 2-3; CCAC Response, Tab A at 12-15, Tab B (Charts D-F); LACTC Response at 16-23, 30-31; GTE Comment, Attach. A at 6-7, Attach. B; McCaw Opposition at 40.

25 Resellers Comments re Confidential Data at 5-7.

Finally, the resellers refuse to acknowledge that cellular carriers are constrained from raising prices by other wireless service providers, as well as competing cellular carriers.[26] As the Wireless Telecommunications Bureau recently recognized,

> ". . . all CMRS services--including paging, SMR, PCS and cellular--are actual or potential competitors with one another, and should therefore be regarded as substantially similar for regulatory purposes . . . . Although technical variations exist among wireless services, their functions frequently overlap with one another and functional overlay can be created easily with moderate investment . . . . For consumers, this results in a wide array of competitive alternatives to choose from, regardless of the service in which a particular provider is licensed."[27]

In fact, the resellers pointedly ignore evidence that cellular carriers have already lowered prices in response to the competitive pressure injected by Nextel.[28] In any event, the Commission has recognized that in an industry facing rapid competitive changes, such as wireless service, market share is not a conclusive measurement of market power.[29]

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26 See id. at 5868-69.

27 Order In the Matter of Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp. (DA 95-263), adopted February 17, 1995; released February 17, 1995, at ¶¶ 26, 28.

28 AirTouch Opposition at 45-46.

29 In re Applications of Craig O. McCaw, 9 FCC Rcd at 5856.

III. THE RESELLERS ADVOCATE PROTECTION OF INEFFICIENT COMPETITORS, RATHER THAN COMPETITION.

The record demonstrates that the CPUC has protected inefficient competitors at the cost of California consumers.[30] The resellers maintain that the CPUC should continue on this misguided path.[31] Indeed, the resellers seek even heavier regulation to insulate them from true competition. However, as this Commission recently recognized, the "priority is to protect competition, not competitors, for the benefit of consumers."[32]

The resellers claim that their inability to compete effectively is tied to the fact that they cannot install switches that would allow them to control costs and introduce new services.[33] The CPUC recognized that the economic feasibility of the reseller switch is debatable and ordered

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30 AirTouch Opposition at 42-46, 61-72, Appx. E (Hausman) at 3-11, 25-26 (Appx. 1), Appx. N; CCAC Response, Tab A at 16-17; U S WEST Opposition at 5-12; LACTC Response at 40-47; Bakersfield Response at 3-8; GTE Comment at 60-65; McCaw Opposition at 46-47, Exh. A at 40-41.

The resellers claim that in the absence of regulatory intervention, cellular carriers would introduce plans that discriminate against subscribers. Resellers Comments re Confidential Data at 6. However, the record demonstrates that the resellers' protests under California's current regulation have arisen not from concerns regarding discrimination, but from the desire to maintain their artificially high profit margin. See AirTouch Opposition at 61-66.

31 The resellers complain that they "must preserve whatever position they can muster" and that they cannot compete "without the protective umbrella of the California PUC." Resellers Comments re Confidential Data at 5.

32 Order In the Matter of Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A., and C-Call Corp. (DA 95-263), adopted February 17, 1995; released February 17, 1995, at ¶ 30.

33 Resellers Comments re Confidential Data at 5.

rehearing on that issue.[34] The CPUC is in the process of implementing the reseller switch and unbundling of the wholesale tariff, despite the fact that no hearings have been held to determine the economic feasibility of the reseller switch. In fact, the resellers have admitted that the reseller switch is not economically feasible in the absence of cost based regulation.[35] Other than protection of an ineffective competitor, there is no justification for the reseller switch and the corresponding unbundling of the wholesale tariff.[36]

The CPUC's regulation has cost consumers approximately $240 million per year. The CPUC now seeks to continue and even augment its regulation, with a projected additional cost of $500

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34 The CPUC concluded that "[b]ecause the economic feasibility of the reseller switch is dependent on unbundling of the wholesale rates, we will grant rehearing on the reseller switch concept so that we may consider these issues together." CPUC Decision 93-05-069 (mimeo) at 8.

35 See, e.g., AirTouch Opposition at 22 (citing Cellular Service Inc.'s Phase II Opening Comments in CPUC proceeding I.88-11-040, dated August 11, 1989, at 1; Exh. W7, CRA witness Charles King's Direct Testimony, at 11-12; Opening Comments and Workshop Proposals of Cellular Service, Inc., dated December 17, 1990, at 5-8; Workshop Summary and Comments of Cellular Service, Inc., dated March 22, 1991, at 3, 18). In the CPUC's investigation, the resellers conceded that the reseller switch "does not purport to offer any unique technology, nor does it expect to provide services that the carriers themselves could not also provide." See, e.g., Opening Brief of Cellular Service Inc. on the Reseller Switch Proposal in CPUC proceeding I.88-11-040 at 9.

36 The resellers contend that Section 332 of the Communications Act of 1934 does not preempt state regulations concerning "unbundling." Resellers Comments re Confidential Data at 2 (fn. 2). The "unbundling" which the CPUC is currently implementing is new rate regulation, not a term and condition of service as claimed by the resellers. The CPUC has "adopted a program of wholesale rate unbundling based upon prices capped at existing rate levels." CPUC Petition at 81.

million to consumers over the 18 month period proposed by the CPUC. Neither the public record evidence nor the confidential data warrant imposing this cost on California consumers.

IV. CONCLUSION.

For the reasons stated herein and in AirTouch's prior comments, the CPUC has failed to meet its burden of proof to present evidence of a demonstrated failure of market conditions in California to protect subscribers. In fact, the confidential data undermine rather than advance the CPUC's case. The CPUC's Petition must, therefore, be denied.

Dated: March 3, 1995.

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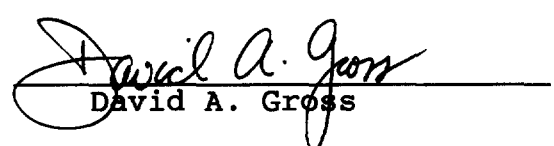
By: 
David A. Gross

Attorneys for AirTouch Communications

CERTIFICATE OF SERVICE

I, Jo Ellen Marsh, do hereby certify that I have on this 3rd day of March, 1995, caused to be forwarded a copy of the foregoing REPLY COMMENTS OF AIRTOUCH COMMUNICATIONS ON THE CONFIDENTIAL DATA SUBMITTED BY THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF ITS PETITION TO RATE REGULATE CALIFORNIA CELLULAR SERVICE by first class United States mail, postage prepaid, to the following:

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